STATE OF MICHIGAN

COURT OF APPEALS

ANNAH JENAE FERGUSON, Plaintiff-Appellant,	UNPUBLISHED August 7, 2014
v	No. 316324 Oakland Circuit Court
OAKLAND COUNTY ROAD COMMISSION, Defendant-Appellee.	LC No. 2012-125396-NO

Before: JANSEN, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals the trial court's opinion and order that granted defendant's motion for summary disposition under MCR 2.116(C)(10). For the reasons stated below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

On March 7, 2010, plaintiff lost control of her car on Pine Knob Road and suffered injury after her vehicle overturned.[1] Plaintiff sued defendant Oakland County Road Commission (OCRC), and claimed that it was negligent because it failed to maintain the road in a safe condition, through reduction and elimination of potholes, ridges and other uneven surfaces. OCRC moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10), and argued that it was immune from suit because it maintained the road as required by law.

Between March 2 and March 5, 2010, defendant received four separate complaints about the road's condition. Defendant's foreman personally inspected Pine Knob Road on or about March 3, 2010, and placed the road on the list for "routine repair." The road was ultimately graded on March 10, 2010.

A homeowner who lives on Pine Knob stated that, given the road's condition, plaintiff was driving at an unsafe speed when she lost control of her car. Likewise, OCRC's accident reconstruction expert estimated that plaintiff was driving at a minimum speed of 42 to 48 miles per hour, and he attributed the accident to "traveling too fast for conditions" and "operat[ing] her

[1] Pine Knob Road is a dirt road.

vehicle in a careless manner." Plaintiff testified in her deposition that she was driving between 20 and 30 miles per hour, and her accident reconstruction expert opined that she was driving between 29 and 38 miles per hour.

The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) because plaintiff failed to show that: (1) the road was not reasonably safe for public travel, i.e., the road had an actionable defect; and (2) defendant had a reasonable time to repair the alleged defect before the injury occurred. Plaintiff appealed the decision to our Court, and argues that the trial court erred when it granted summary disposition to defendants.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo,[2] as is an issue of governmental immunity. *Sharp v City of Benton Harbor*, 292 Mich App 351, 352; 806 NW2d 760 (2011). Summary disposition is warranted under MCR 2.116(C)(7) when a claim is barred because of immunity granted by law. *Miller*, 262 Mich App at 643. Summary disposition is warranted under MCR 2.116(C)(10) when there is no genuine issue as to any material fact. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

III. ANALYSIS

The Governmental Tort Liability Act (GTLA) mandates that "except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency[3] is engaged in the exercise or discharge of a governmental function."[4] MCL 691.1407(1). The other sections of the GTLA contain narrow, specified exceptions to governmental immunity from tort claims. See *In re Bradley Estate*, 494 Mich 367, 378; 835 NW2d 545 (2013).

MCL 691.1402(1) is one such section, and at the time relevant to this case, it stated in part:

> [E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for

[2] *Miller v Lord*, 262 Mich App 640, 643; 686 NW2d 800 (2004).

[3] As used in the statute, the term "governmental agency" is much broader than its wording suggests and includes: "this state or a political subdivision." MCL 691.1401(a). In turn, "political subdivision" encompasses both "municipal corporations" and "count[ies]." MCL 691.1401(e).

[4] "Governmental function" is defined as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(b).

> travel may recover the damages suffered by him or her from the governmental agency. [See 1999 PA 205.[5]]

However, MCL 691.1403 explicitly limits MCL 691.1402(1)'s exception to the GTLA's general immunity provisions:

> No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place. [MCL 691.1403.]

As used in MCL 691.1403, "defect" refers to an "imperfection . . . which renders the highway not 'reasonably safe and convenient for public travel.' " *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 168; 713 NW2d 717 (2006), quoting MCL 691.1402(1). Accordingly, "to defeat governmental immunity based on MCL 691.1402, a plaintiff must establish that the defendant knew or should have known about the defect and had notice that the defect made the road not reasonably safe and convenient for public travel." *Id*. at 170. A road that is "rough or uneven" is not necessarily unsafe, especially when other drivers are able to safely travel on the road with careful driving. *Jones v Detroit*, 171 Mich 608, 611; 137 NW 513 (1912).

Here, plaintiff failed to show that Pine Knob Road had an actionable defect that made it not "reasonably safe and convenient for public travel." MCL 691.1402(1). The photographs of the road and the deposition testimony only show that the road was rough, bumpy, and included several potholes—not that it was "not reasonably safe and convenient for public travel." In fact, plaintiff did not dispute the testimony of the homeowner that a driver could safely travel over Pine Knob Road by maintaining a slow speed, notwithstanding its poor condition in the early spring. Because the road could be safely traveled by driving at an appropriate speed, it was reasonably safe and convenient for public travel. *Jones*, 171 Mich at 611. And because the road was reasonably safe and convenient for public travel, it did not have an actionable defect. See *Wilson*, 474 Mich at 170.

Nor has plaintiff demonstrated that defendant had a reasonable time to repair the alleged defect before her injury occurred on March 7, 2010. March 2, 2010 was the earliest possible date defendant could have received notice of the alleged defect in the road. Defendant's foreman promptly inspected the road and listed the road for routine repair, i.e., grading. Failure to grade the road within a mere five days does not constitute failure to repair the road within a "reasonable time," as OCRC has limited resources to grade its dirt roads in the early spring. See *Sable v Detroit*, 1 Mich App 87, 91; 134 NW2d 375 (1965) (under prior version of statute, 30 days constituted a "reasonable time" to repair a defect). Plaintiff's claim therefore fails as a

[5] MCL 691.1402 was amended by 2012 PA 50, effective March 13, 2012. The changes are not pertinent to this appeal.

matter of law because defendant did not have a reasonable time to repair the alleged defect. See *Pierce v Lansing*, 265 Mich App 174, 183; 694 NW2d 65 (2005).[6]

The trial court therefore properly granted summary judgment to defendants pursuant to MCR 2.116(C)(10).[7]

Affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Pat M. Donofrio

[6] Plaintiff also argues that the trial court made an improper finding of fact when it stated that she drove at an unsafe speed, as she submitted evidence to show that she drove well below the 55 miles per hour speed limit when she lost control of her car. However, the trial court did not base its grant of summary disposition on the actual speed of plaintiff's vehicle. Rather, the court determined that "[t]estimony from witnesses and the investigating officer indicate that Plaintiff was travelling too fast for the road conditions and that the road could have been safely travelled at a lower speed." The relevant issue, as properly identified by the trial court, is not the precise speed of the car when plaintiff lost control, but whether the road was reasonably safe and convenient for public travel if drivers proceeded carefully under the conditions presented. See *Jones*, 171 Mich at 611.

[7] We need not consider plaintiff's argument that she established a genuine issue of material fact as to whether defendant had notice of the alleged defect, because the trial court did not grant summary disposition on the basis that defendant did not have notice of the defect.